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Rhode Island Enacts Significant Amendments to Pay Equity Law, Including Wage Disclosure Protections and Salary History Ban--Includes Notice Requirement
Requires Policy Changes

Posted July 27, 2021 - Rhode Island has enacted significant amendments to its wage discrimination statute. The amendments prohibit wage discrimination based on a number of protected characteristics, modify the wage discrimination standard from "equal work" to "comparable work," and create a safe harbor from liability for employers that choose to undertake evaluations of their pay practices. Additionally, the amendments provide that an employer cannot prohibit its employees from disclosing or discussing their wages, and cannot retaliate against employees who do so. The amendments also limit salary history inquiries and prohibit employers from requesting or relying on an applicant's wage history in determining whether to hire an applicant and in setting the compensation for a new hire. Employers must also provide a wage range for a job position to both applicants and current employees.

Wage Discrimination

Rhode Island law prohibits an employer from discriminating in the payment of wages on the basis of sex and from paying a female employee a salary or wage rates less than the rates paid to male employees for equal work or work on the same operations. However, the law does not prohibit a variation in rates of pay based upon a difference in (1) seniority, experience, training, skill, or ability; (2) the duties and services performed, either regularly or occasionally; (3) the shift or time of day worked; or (4) the availability for other operations or any other reasonable differentiation except difference in sex.

The amended law prohibits wage differentials based on protected characteristics. In addition to prohibiting wage discrimination on the basis of sex, an employer is also prohibited from paying any of its employees at a wage rate less than the rate paid to employees of another race, color, religion, sexual orientation, gender identity or expression, disability, age, or country of ancestral origin for comparable work. "Comparable work" means work that requires substantially similar skill, effort, and responsibility, and is performed under similar working conditions. Determining whether jobs are comparable will require an analysis of the jobs as a whole. Minor differences in skill, effort, or responsibility will not prevent two jobs from being considered comparable.

The amendments also expand upon the test for determining whether a wage differential may nonetheless be allowed. A wage differential may be permitted where the employer demonstrates:

- The employer's pay systems are fair and are not being used as a pretext for an unlawful wage differential;
- The differential is based upon one or more of the following factors:
    - A seniority system, except that time spent on leave due to a pregnancy-related condition or parental, family and medical leave cannot reduce seniority;
    - A merit system;
    - A system that measures earnings by quantity or quality of production;
    - Geographic location, when the locations correspond with different costs of living, provided that no location within the state will be considered to have a sufficiently different cost of living. This clause will apply at the employer's discretion and for the limited purpose of determining wage differentials for employees;
    - A reasonable shift differential, which is not based upon or derived from a differential in compensation based on a protected characteristic;

  - Education, training, or experience to the extent such factors are job-related and consistent with a business necessity;
  - Work-related travel, if the travel is regular and a business necessity; or
  - A bona fide factor other than a protected characteristic, that is not based upon or derived from a differential in compensation based on a protected characteristic) and that is job-related with respect to the position in question and is consistent with business necessity. This factor will not apply if the employee demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential and that the employer has refused to adopt the alternative practice. A cost prohibitive alternative business practice is not considered an alternative business practice;
- The factor or factors relied upon reasonably explain the differential; and
- Each factor is relied upon reasonably.

An individual's wage history cannot, by itself, justify an otherwise unlawful wage differential. Further, an employer cannot reduce the wage rate of any employee in order to comply with the law.

A waiver of rights under the statute is not generally permitted. An employee's agreement to work for less than the wage to which the employee is entitled is not a defense to an action alleging a violation of the statute. However, in the event an employer provides health insurance or retirement benefits as a benefit to employees, a difference in these benefits due to an employee's written decision to decline a benefit will not be considered a violation, as long as the employer provides equal access to the benefits. Any provision in any contract entered into after January 1, 2023 establishing a variation in rates of pay based on a protected characteristic will be null and void, except that the statute does not limit the rights of an employee provided by any other provision of law or collective bargaining agreement.

Wage Transparency

An employer may not prohibit an employee from inquiring about, discussing, or disclosing the employee's own wages or the wages of another employee, or retaliate against an employee who engages in such activities, though nothing in the amended law requires employees to disclose their wages. Additionally, employers may not require an employee to enter into a waiver or other agreement that purports to deny the employee the right to disclose or discuss their wages. Further, an employer may not prohibit an employee from aiding or encouraging any other employee to exercise their rights under the law.

We will add a "Discussion of Wages" policy to the Rhode Island handbook supplement closer to the January 1, 2023 effective date of the amendments.

Wage History Inquiry Restriction and Wage Range Requirement

The amendments limit the ways in which an employer may access and use a job applicant's wage or salary history. An employer is prohibited from:

- Seeking an applicant's wage history;
- Relying on an applicant's wage history when deciding whether to consider the applicant for employment;
- Requiring that an applicant's prior wages satisfy minimum or maximum criteria as a condition of being considered for employment; or
- Relying on an applicant's wage history in determining the wages the applicant is to be paid by the employer upon hire.

"Wage history" means the wages paid to an applicant for employment by the applicant's current employer and/or previous employer or employers, but does not include any objective measure of the applicant's productivity, such as revenue, sales, or other production reports.

However, after an employer makes an initial offer of employment to an applicant that includes an offer of compensation, an employer may:

- Rely on the applicant's wage history to support a wage higher than the wage offered by the employer, if the applicant voluntarily provided their wage history without prompting from the employer;
- Seek to confirm the applicant's wage history to support a wage higher than the wage offered, when relying on wage history the applicant voluntarily provides; and
- Rely on wage history to the extent that the higher wage does not create an unlawful pay differential based on protected characteristics.

The amended law does not preclude an employer from verifying information voluntarily provided by a job applicant regarding the applicant's unvested equity or deferred compensation that the applicant would forfeit or have cancelled by virtue of the applicant's resignation from their current employer, or any voluntary disclosure of non-wage related information. The law does not preclude employers from verifying information that an applicant voluntarily provides. Employers may request a background check that does not seek wage history, but if the background check discloses an applicant's wage history, the employer cannot rely on that information for purposes of determining wages, benefits, or other compensation for the applicant during the hiring process, including contract negotiation.

With respect to current employees, employers will not be penalized for having knowledge of an employee's wage history if the employee currently works for the employer.

The amendments also create a new requirement to provide a wage range to applicants and employees. Upon an applicant's request, an employer must provide an applicant the wage range for the position the applicant is seeking and should provide the wage range before discussing compensation. "Wage range," as applied to an applicant, means the wage range that the employer anticipates relying on in setting wages for the position and may include reference to any applicable pay scale, previously determined range of wages for the position, the actual range of wages for those currently holding equivalent positions, or the budgeted amount for the position, as applicable.

Additionally, an employer must provide an employee the wage range for the employee's position at the time of hire and when the employee moves into a new position. During the course of employment, upon an employee's request, an employer must provide the wage range for the employee's position. "Wage range," as applied to a current employee, may include reference to any applicable pay scale, previously determined range of wages for the position, or the range of wages for incumbents in equivalent positions, as applicable.

Employers may not refuse to interview, hire, promote, or employ an applicant or employee, and may not retaliate against an applicant or employee because they did not provide a wage history or because they requested a wage range.

Employer Self-Evaluation

The amended law creates a safe harbor for employers that conduct an evaluation of their pay practices. In an action alleging an unlawful wage differential, an employer has an affirmative defense to all liability if the employer demonstrates that it conducted a good faith self-evaluation of its pay practices within the previous two years, and prior to the commencement of action, and can demonstrate that any unlawful wage differentials revealed by the self-evaluation have been eliminated. The employer's self-evaluation may be of the employer's own design or on a standard template or form to be issued by the Department of Labor and Training, as long as the self-evaluation reflects the employer's due diligence to identify, prevent, and mitigate violations of the law.

In determining whether a self-evaluation reflects the exercise of due diligence, the factors to be considered include, but are not limited to:

- Whether the evaluation includes all relevant jobs and employees within those relevant jobs;
- Whether the employer's analysis makes a reasonable effort to identify similar jobs and employees using a consistent, fact-based approach;
- Whether the employer has tested explanatory factors for an unbiased and relevant relationship to pay;
- Whether the evaluation takes into account all reasonably relevant and available information; and
- Whether the evaluation is reasonably sophisticated in its analysis of potentially comparable work, employee compensation, and the application of the permissible reasons for wage differentials.

An employer's failure to retain the records necessary to show the manner in which it evaluated and applied these factors may give rise to an inference that the employer did not exercise due diligence in conducting its self-evaluation. Evidence that a self-evaluation has been conducted or that remedial steps have been undertaken is not sufficient evidence, standing alone, to find a violation that occurred prior to the date of the completion of the self-evaluation. An employer that has not completed a self-evaluation will not be subject to any negative or adverse inference as a result of not having completed a self-evaluation.

In determining whether an employer has eliminated an unlawful wage differential revealed by its self-evaluation, the court will determine whether the employer has adjusted salaries or wages in order that employees performing comparable work are paid equally and whether any salary or wage adjustments have been completed prior to commencement of the action. An employer will have 90 days from the date of completion of its self-evaluation to adjust wages beginning from the day in the pay period the self-evaluation was completed.

This affirmative defense to liability is available to employers beginning on January 1, 2023 and ending June 30, 2026.

Wage Discrimination Notice

The amended law requires an employer to post a notice, to be prepared or approved by the Director of Labor and Training ("Director"), setting forth excerpts of the law and other relevant information which the Director deems necessary to explain the law to the employees. Employers that fail to comply with the posting requirement will be fined not less than $100 but not more than $500.

Enforcement and Penalties

An aggrieved applicant for employment, employee, or former employee may file a complaint with the Director or may file civil action regarding wage discrimination, though an civil action cannot be filed if the individual also filed an administrative complaint and the Director has issued a notice of hearing. Claims must be filed within two years of when the claimant knew of, or should have known of, the occurrence of discrimination, except that a claimant may file a sworn complaint demonstrating facts that establish a willful and wanton violation of the law within three years of when the claimant knew of or should have known of the violation. "Occurrence of discriminatory practice" means whenever a discriminatory compensation decision or other practice is adopted; whenever an individual becomes subject to a discriminatory compensation decision or other practice; or whenever an individual is affected by the application of a discriminatory compensation decision or other practice. Each instance of payment of wages, benefits, or other compensation that result in whole or in part from a discriminatory decision or other practice is considered a separate violation. Prior to filing a complaint, a claimant must provide the employer with written notice of the claimant's intent to commence an action at least 45 days prior to the commencement of the action, and the written notice must include a statement from the claimant indicating the claimant's belief that an unlawful wage differential exists and that it applies to the claimant.

An employer that violates the wage discrimination provisions may be liable for any compensatory damages, or special damages not to exceed $10,000, appropriate equitable relief, and reasonable attorneys' fees and costs. An employer may also incur a civil penalty ranging from $1,000 to $5,000 depending on whether the employer has previous violations of the law. No civil penalties will be assessed from January 1, 2023 through December 31, 2024.

For additional analysis see Jillian Folger-Hartwell, Gregory Henninger and Maureen Lavery, Rhode Island Enacts Comprehensive Pay Equity Law, Littler Insight (July 28, 2021).